No. 15-674

In The
# Supreme Court of the United States

UNITED STATES OF AMERICA ET AL., PETITIONERS

*v.*

STATE OF TEXAS ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR PROFESSOR WALTER DELLINGER AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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## BRIEF FOR PROFESSOR WALTER DELLINGER AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

This brief is submitted on behalf of Professor Walter Dellinger.[1]

## INTEREST OF AMICUS CURIAE

Walter Dellinger is the Douglas B. Maggs Professor Emeritus of Law at Duke University.[2] Professor Dellinger has studied the scope of the Article III jurisdiction of federal courts, including issues relating to Article III standing. He likewise has studied the scope of judicial review under the Administrative Procedure Act (APA), 5 U.S.C. § 500 *et seq*. Based on his study of the applicable precedent and principles, he believes that none of the respondent States has standing to challenge the November 20, 2014 memorandum on immigration enforcement issued by the

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amicus curiae or his counsel made a monetary contribution to the preparation or submission of this brief. Although Professor Dellinger is also a partner at O'Melveny & Myers, LLP, which is pro bono co-counsel for intervenors-respondents Jane Does, Professor Dellinger did not participate in the drafting of that brief.

[2] The institutional affiliation is listed for identification purposes only.

Secretary of the Department of Homeland Security (Guidance), and that the APA does not provide them a cause of action.

Professor Dellinger filed an amicus brief in support of respondents on the issue of standing in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court draws much of its legitimacy from deciding *not* to decide. The Court "is vested with the 'Power' to resolve not questions and issues but 'Cases' or 'Controversies.'" *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 132 (2011). "Continued adherence to the case-or-controversy requirement of Article III maintains the public's confidence in an unelected but restrained Federal Judiciary." *Id.* at 133. For "[i]f a dispute is not a proper case or controversy," its resolution is committed to the political and legislative process, and "the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006).

These principles are at their most salient here, where "[t]he public is currently engaged in an active political debate over" this subject matter. *Hollingsworth*, 133 S. Ct. at 2659. Indeed, this case has all the trappings of an epic political battle. More than half the States are arrayed against the federal government. Many other States take the opposite view and argue they are affirmatively harmed by the injunction imposed at the behest of the first group of States. At issue is immigration, one of the most divisive, ideologically charged questions of our day. And the case arrives at this Court in the midst of a presidential election campaign in which the very policy challenged here is a central issue of contention.

Given the political electricity pulsing through this case, the Court must take extra care to determine whether it is a "Case[ ]" that can be decided by the federal judiciary, and, even if so, whether any cause of action provides a basis for review. Application of long-settled principles yields but one answer to those questions: no. The purported injuries respondents assert are both self-imposed and non-concrete, and the policy they challenge is a quintessential case of enforcement discretion. The dispute accordingly presents only "questions and issues" (*Winn*, 563 U.S. at 132) that must be left to the political process.

To hold otherwise would not only inject the Court into this political maelstrom, but also the next one, and the next. For the theory of standing advanced by respondents here would not be good for this case only. If adopted, it would open wide a back door to federal court for States seeking resolution of a host of politically charged disputes where the front door to individual plaintiffs has been barred by this Court's precedents. Respondents' novel theory of APA review would likewise place the courts in a supervisory status over a wide range of discretionary executive decisions, without any meaningful standards for evaluating them.

The judgment of the court of appeals should be reversed.

## ARGUMENT

### I. RESPONDENT STATES LACK ARTICLE III STANDING

Article III of the Constitution gives federal courts the power to resolve only "Cases" and "Controversies." That limited power allows a federal court to settle disputes only if the party before it "seek[s] a remedy for a personal and tangible harm." *Hollingsworth*, 133 S. Ct. at 2661. "Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992).

To have the personal stake required by Article III, a party must show, at a minimum, that (1) it has suffered an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) there is "a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant"; and (3) it is "likely" that "the injury will be redressed by a favorable decision." *Id.* at 560 (quotation marks, alterations, and citations omitted).

Respondents cannot make that showing here because their alleged injuries are not fairly traceable to the Guidance and are neither concrete nor particularized. Allowing the Fifth Circuit's contrary conclusion to stand would open federal courts to a flood of

political litigation that this Court's standing precedent has until now barred.

### A. Respondents Fail To Show That Any Injury Is Fairly Traceable To The Guidance

Respondents do not have standing to sue the United States because they cannot show an injury that is fairly traceable to the challenged Guidance. Any injury they suffer—if indeed there is one, *cf. infra* Section I.B—is instead the result of their own voluntary choices. Such self-imposed "injury" has never provided a ticket to federal court.

1. When "the plaintiff is [itself] an object of the action (or forgone action)" it wishes to challenge, "there is ordinarily little question that the action or inaction has caused [it] injury, and that a judgment preventing or requiring the action will redress it." *Defenders of Wildlife*, 504 U.S. at 561-62. But when "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed." *Id.* at 562. The "standing" of the non-regulated plaintiff "is ordinarily substantially more difficult to establish." *Ibid.* (quotation marks omitted). When the plaintiff seeks to challenge a decision not to prosecute someone else, the obstacle to standing is insurmountable. *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). And, as particularly relevant here, a plaintiff lacks any "judicially cognizable interest in procuring enforcement of the immigration laws" against another. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984).

Respondents, who are not the object of the Guidance or at all regulated by it, fall well short of surmounting these obstacles. The "subsidized driver's license" injury to Texas on which the Fifth Circuit relied is self-imposed and therefore not fairly traceable to the federal action respondents seek to challenge.

Texas's theory of standing goes like this. Under Texas law, non-citizens may apply for a driver's license if they present "documentation issued by the appropriate United States agency that authorizes the applicant to be in the United States." Tex. Transp. Code § 521.142(a). Texas has chosen to construe this statute to cover "documentation" that an alien receives when granted "deferred action." Tex. Dep't of Pub. Safety, *Verifying Lawful Presence* 4 (July 2013). Texas charges $24 to issue a driver's license, Tex. Transp. Code § 521.421(a-3), an amount Texas contends is below its actual cost, Pet. App. 20a-21a. Texas posits that because of the Guidance more Texas residents would be eligible for driver's licenses and thus apply to receive them. And because Texas subsidizes each license it issues, Texas will spend more money as a result of the Guidance. That supposed pocket-book injury, the argument goes, gives Texas standing to challenge the Guidance.[3]

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[3] Although here the State decided to tie its subsidy to federal documentation before the federal government expanded the policy that the State wishes to challenge, there is nothing in the logic of respondents' standing theory that requires that sequence. The same theory of standing would seemingly hold

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That chain of causation is broken at its very first link—Texas's voluntary choice to confer a state subsidy (for a driver's license) based on a federal policy (of granting deferred action and accompanying documentation to an alien). When Texas made that choice, it understood that the federal government historically had granted deferred action to different categories of aliens over time and presumably would continue to do so. Yet the State still voluntarily chose to tie its subsidy to another sovereign's choices. And after the scope of the federal policy did in fact expand, Texas has voluntarily adhered to its decision to confer a state subsidy based on federal documentation. Those voluntary choices by Texas, rather than any federal action, are the legally cognizable cause of any increased state expenditures on driver's licenses.

Texas and other States that have made that choice are thus just like Pennsylvania in *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976) (per curiam). There, the Pennsylvania legislature had voluntarily provided a Pennsylvania tax credit for taxes Pennsylvania residents paid to New Jersey. *Id.* at 663. Pennsylvania then attempted to sue New Jersey, claiming that New Jersey's tax on Pennsylvania residents was unlawful. Pennsylvania asserted it was injured because the challenged New Jersey tax

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even if Texas had adopted its current driver's-licensing scheme after issuance of the Guidance. In both instances, any "injury" from a change to federal practice would be self-imposed.

resulted in decreased revenue for Pennsylvania due to increased Pennsylvania tax credits.

This Court held that Pennsylvania had no standing to sue because any injury related to New Jersey's tax was "self-inflicted." *Id.* at 664. The Court observed that "nothing prevents Pennsylvania from withdrawing that credit for taxes paid to New Jersey." *Ibid.* Any harm to the Pennsylvania fisc was therefore not fairly traceable to New Jersey but instead to its own decision not to withdraw the tax credit. "No State can be heard to complain about damage inflicted by its own hand." *Ibid.*[4]

So too here. Texas was not required to offer a subsidy to driver's-license applicants based on federal documentation of deferred-action status. Having voluntarily ceded to another sovereign the effective decision regarding which parties merit such a subsidy, Texas has no right to complain in federal court that it is now unhappy with that other sovereign's choice.[5]

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[4] Although the Court in *Pennsylvania v. New Jersey* framed the issue as one of causation, one could equally view a self-imposed "injury" as no cognizable injury at all. Either way, a self-imposed injury would not satisfy Article III's case-or-controversy requirement.

[5] Respondents attempt to avoid the "self-inflicted injury" problem with their theory of standing by relying on *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), Br. in Opp. 15-16, but that effort fails. That case did not involve a sovereign's attempt to challenge another sovereign's law on which the first sovereign had voluntarily based eligibility for a benefit. The situation was just the opposite: the challenged Oklahoma statute explicitly targeted

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2. Respondents' theory of standing would not only provide a basis for States to challenge myriad federal immigration decisions, *see* Pet. Br. 31, but it would also provide a ready work-around in many other cases where courts have found that individual plaintiffs lacked standing. By following the path laid out by respondents here, States could effectively step into those individual plaintiffs' shoes and litigate policy disputes with the federal government. That would turn standing doctrine on its head. This Court has long recognized that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982) (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923), and *Missouri v. Illinois*, 180 U.S. 208, 241 (1901)). A State therefore has no standing to raise individual plaintiffs' claims even when the individuals *would* have standing. If no individual would have standing, it should therefore follow a fortiori that a State would not either.

The Texas work-around could be applied, for example, to evade the courts' consistent holdings that plaintiffs do not have standing to challenge others' tax exemptions. For example, in *Allen v. Wright*, 468

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Wyoming for discrimination and Wyoming filed suit to defend itself. *See Wyoming*, 502 U.S. at 443. There is a reason why the later-decided *Wyoming v. Oklahoma* did not cite *Pennsylvania v. New Jersey*: the standing inquiries in the two cases are wholly unrelated.

U.S. 737 (1984), "[p]arents of black public school children allege[d]" that the Internal Revenue Service (IRS) "ha[d] not adopted sufficient standards and procedures to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools." *Id.* at 739. They sought, among other things, "an injunction requiring the IRS to deny tax exemptions to a considerably broader class of private schools" than was the case under then-policy. *Id.* at 747. This Court held that plaintiffs lacked standing because the "line of causation between" the "IRS's grant of tax exemptions to some racially discriminatory schools" and "desegregation of [plaintiffs' children's] schools [was] attenuated at best." *Id.* at 757.

Likewise, in *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976), this Court held that "[s]everal indigents and organizations composed of indigents" lacked standing to challenge an IRS revenue ruling that confirmed a hospital's Section 501(c)(3) "charitable" status even though (the plaintiffs alleged) the hospital provided inadequate care to indigents. *Id.* at 28, 37-45. In particular, the Court held that it was "speculative" whether the revenue ruling would result in an increased denial of service to indigents. *Id.* at 42.

And in *In re U.S. Catholic Conference*, 885 F.2d 1020 (2d Cir. 1989), the Second Circuit held that abortion-rights groups lacked standing to challenge the tax-exempt status of the Roman Catholic Church based on its alleged political activities. *Id.* at 1022, 1031. Among other things, the court held that

plaintiffs lacked "taxpayer standing" to challenge the IRS's alleged failure to properly enforce rules governing 501(c)(3) organizations. *Id.* at 1028; *see also Am. Soc'y of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145, 147 (D.C. Cir. 1977) (no standing to challenge tax-exempt status of American Jewish Congress).

Under respondents' theory of standing in this case, however, States would have standing to assert all of these claims. Many States choose to grant tax exemptions from their own state taxes to organizations that are tax exempt under federal law. *E.g.*, Bruce R. Hopkins, *The Law of Tax-Exempt Organizations* § 3.4 (11th ed. 2015); Cal. Rev. & Tax. Code §§ 23701-23712; Tex. Tax Code §§ 151.310(2), 171.063(a). That voluntary choice means that a State loses tax revenue when the IRS grants (or maintains) an entity's tax-exempt status under 26 U.S.C. § 501(a), (c)(3). If Texas has standing in this case, then that revenue impact would lead to state standing to challenge the IRS's conferral of federal tax-exempt status on an entity or class of entities, such as the private schools in *Allen*, the hospitals in *Eastern Kentucky Welfare Rights Organization*, or the Roman Catholic Church in *In re U.S. Catholic Conferences*.

The opening of the standing back door would not be limited to challenges to tax-exempt status. In *Freedom from Religion Foundation v. Lew*, 773 F.3d 815 (7th Cir. 2014), the Seventh Circuit held that individual plaintiffs lacked standing to raise an Establishment Clause challenge to the "parsonage exemption," which "excludes the value of employer-provided

housing benefits from the gross income of any 'minister of the gospel'" for federal income tax purposes. *Id.* at 818 (quoting 26 U.S.C. § 107). Nearly every State has opted to use federal gross income as the base for calculation of state income taxes. *See* Ruth Mason, *Delegating Up: State Conformity with the Federal Tax Base*, 62 Duke L.J. 1267, 1269 (2013). Under respondents' standing theory, any of those States would have standing to challenge the parsonage exemption, any expansion of it, or any feature of federal tax law that lowers federal gross income on the ground that state income tax revenue has been reduced.

States voluntarily incorporate federal law or practices in myriad other ways.[6] Many changes at the federal level will therefore inevitably have fiscal or other impacts on the States. When a State does

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[6] Texas law alone offers many examples. Texas provides free tuition and other subsidies to disabled veterans, borrowing the federal definition for who qualifies. Tex. Educ. Code § 54.341; *see* Pet. Br. 32 (listing other examples). If the federal government were to change how it defines who is a disabled veteran, the effect on Texas's budget would likely be far greater than in this case. *See also* Tex. Educ. Code §§ 5.001(4), 29.153(b)(2) (requiring school districts to offer free prekindergarten to children who meet federal standard for free or reduced-price lunch); *id.* § 54.241 (subsidized higher education for qualifying military personnel and their families); *see generally* F. Scott Boyd, *Looking Glass Law: Legislation by Reference in the States*, 68 La. L. Rev. 1201, 1262-73 (2008) (observing that "states have probably adopted federal law on almost every imaginable subject" and providing examples).

not like incorporated federal policy—whether because of the corresponding impact on its fisc or otherwise—its proper recourse is through the political system. The State can seek relief either at the federal level, where it can press for a change in federal policy, or before its own legislature, where it can avoid the fiscal impact by exercising its sovereign prerogative to modify or abandon its reliance on federal law. It cannot, however, properly use its voluntary incorporation of federal actions to create an end-run around established rules of Article III jurisdiction.

The court of appeals was untroubled by such possibilities because it thought it "pure speculation" that respondents or other States "would sue about matters such as * * * IRS revenue ruling[s]." Pet. App. 35a. But just as this Court "would not uphold an unconstitutional statute merely because the Government promised to use it responsibly," *United States v. Stevens*, 559 U.S. 460, 480 (2010), the Court should not find Article III satisfied merely because plaintiffs promise not to irresponsibly use a relaxation of standing requirements in future cases.

3. In each of the preceding examples, and many others, the State could simply avoid the alleged injury by changing its laws so that they no longer incorporate another sovereign's choices. The Fifth Circuit thought that the need for such a change would *itself* be a harm caused by federal policy—according to that court, the Guidance placed "substantial pressure" on Texas to change its driver's-license law, thus giving Texas standing. Pet. App. 16a.

If such "pressure" conferred standing, it would lead to the radical conclusion that a State would have standing whenever it adopts federal classifications, including in every one of the scenarios discussed above. *See supra* pp. 12-13 & n.6. The same pressure was present in *Pennsylvania v. New Jersey*, yet the Court still held that Pennsylvania's "self-inflicted" injury could not be the basis for standing. 426 U.S. at 663-64. In particular, the Court held that the answer to Pennsylvania's injury was not a federal lawsuit but Pennsylvania's "withdrawing [its] credit for taxes paid to New Jersey." *Id.* at 664. The "pressure" to take that legislative step provided no basis for standing; "[n]o sovereign or quasi-sovereign interests" of the State were "implicated." *Id.* at 666. Nor are they here.

That there may be constitutional or other limits on Texas's options for changing its driver's-license program to avoid its self-imposed "harm" does not change the analysis. *See* Pet. Br. 28. Those exogenous constraints do not arise from the Guidance and are therefore not relevant to the question of respondents' standing to challenge it. The Pennsylvania legislature would have likewise faced constraints on its ability to change its tax scheme in *Pennsylvania v. New Jersey*. *See Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787, 1805-06 (2015) (holding that Maryland violated the dormant aspect of the Commerce Clause by refusing to grant a tax credit for

taxes paid to another State).[7] Yet those external constraints did not alter the Court's conclusion that Pennsylvania's injury was "self-inflicted" and therefore provided no basis for standing.

It is pure speculation, moreover, that Texas is constrained from adopting its preferred licensing scheme because we do not even know what that scheme might be. Texas asserts that it is forbidden by federal law from creating its own immigration classifications and that this somehow prevents it from achieving its policy goals. Br. in Opp. 16. To the contrary, nothing in the Guidance appears to prevent Texas from achieving the objectives reflected in its laws and regulations. Current Texas law bases

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[7] In *Wynne*, Maryland taxed both the income that residents of other States earned from sources in Maryland and the income that Maryland residents earned from out-of-state sources. 135 S. Ct. at 1792. Because Maryland did not provide a full Maryland income tax credit for taxes its residents paid to other States, its scheme discriminated against interstate commerce by effectively taxing more heavily income earned elsewhere. *Id.* at 1803-04. The Court explained that its conclusion was "all but dictate[d]" by three cases that predate the decision in *Pennsylvania v. New Jersey*. *See id.* at 1794-95 (citing *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938); *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939); *Cent. Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948)). Thus, although Pennsylvania would have been free to drop its tax credit for income earned in New Jersey (and thus avoid its self-inflicted injury), the dormant Commerce Clause likely would have required it to simultaneously drop any tax on income earned by New Jersey residents from Pennsylvania sources or forbear from adopting one. *See id.* at 1806.

driver's-license eligibility solely on the *fact* of the Secretary's having issued "documentation" to an alien—without any qualification, such as a requirement that the issuance have been authorized by federal law. Tex. Transp. Code § 521.142(a); *Verifying Lawful Presence* 1-5. Aliens eligible for deferred action under the Guidance would have such "documentation" as a factual matter, and there is nothing on the face of the Texas statute (or the regulations interpreting it) indicating that providing them driver's licenses would conflict with any state policy. And there are plausible reasons why Texas may have decided to rely on the fact of documentation: By accepting the federal government's documentation as the trigger for a driver's license, Texas avoids any need to independently investigate the conditions surrounding an alien's immigration status.

If Texas has some other policy goal not apparent from its laws, it has failed to disclose it, much less explain how it might be thwarted. Texas policy, of course, can only be determined from its existing statutes and regulations, or any new legislation or administrative rule; it cannot be articulated by its attorneys in a brief. If Texas *lawmakers* desire a different policy, Texas is free to stop subsidizing all driver's licenses, or to stop subsidizing those issued to aliens with deferred action, or to take any number of other actions. *See* Pet. Br. 26. Yet Texas has shown no interest in taking those steps. Until Texas or another State actually takes some action toward adopting a different policy, federal courts are not a

proper forum for debating the issue. *See New Jersey v. Sargent*, 269 U.S. 328, 338 (1926) (holding that New Jersey lacked standing to challenge the Federal Water Power Act where "[t]here is no showing that the state is now engaged or about to engage in any work or operations which the act purports to prohibit or restrict, or that the defendants are interfering or about to interfere with any work or operations in which the state is engaged").

In the hypothetical event Texas or another State were to adopt a policy of providing (or subsidizing) driver's licenses for some, but not all, deferred action recipients, an aggrieved alien with deferred action could file suit to challenge that denial. Such a rejected license-seeker would of course have an injury and standing. That would be a proper lawsuit for the determination of any limitations on state authority to carry out some other preferred policy. To the extent that such a disappointed license applicant sought to rely upon the federal Guidance as a basis for challenging the license rejection, a State could argue in response that it was not required to give licenses to those aliens covered by the Guidance and, in the alternative, that the Guidance was invalid. The issue would thus be joined in a conventional case undergirded by a real injury. At present, however, respondents' claim of injury is doubly speculative: we do not know whether Texas does wish to adopt any different policy,

and we do not know whether there is any reason it cannot do so.[8]

### B. Texas Has No Concrete, Particularized Injury That Is Either Actual Or Imminent

Respondents lack standing for a second, independent reason: they fail to allege a concrete injury and therefore do not satisfy Article III. Standing to sue requires a "distinct and palpable" injury, *Allen*, 468 U.S. at 751, "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination," *Baker v. Carr*, 369 U.S. 186, 204 (1962). A bare allegation that some action will require increased state spending does not establish a concrete injury; pointing to the costs of a state program "is just the beginning of the analysis." *Winn*, 563 U.S. at 137.

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[8] The circumstances of this case bear no resemblance to those in *Arizona State Legislature v. Arizona Independent Restricting Commission*, 135 S. Ct. 2652 (2015). *Cf.* Br. in Opp. 19. There, this Court held that the Arizona legislature had standing to challenge an Arizona constitutional amendment on redistricting, even though the legislature had yet to take any specific redistricting action that might have been barred by the challenged amendment. *Id.* at 2663-65. That was so because "*any*" redistricting action the legislature took "would directly and immediately conflict with the regime Arizona's Constitution establishes." *Id.* at 2663-64 (emphasis added). Here, by contrast, state lawmakers have numerous options for structuring their driver's-license programs, as the diversity of existing state programs shows.

1. This Court has repeatedly rejected standing to sue when plaintiffs allege the type of injury respondents allege here—increased government spending. *See* Br. in Opp. 12-13, 17 (claiming standing on the ground that the Guidance would "impose substantial costs on [respondents'] driver's-license programs" and would "cause [respondents] to incur healthcare, law-enforcement, and education costs"). The Court has explained that when a government expends resources, "its budget does not necessarily suffer." *Winn*, 563 U.S. at 136; *see Cuno*, 547 U.S. at 344. "On the contrary, the purpose of many governmental expenditures and tax benefits is to 'spur economic activity, which in turn *increases* government revenues,'" or to provide other expected benefits. *Winn*, 563 U.S. at 136 (quoting *Cuno*, 547 U.S. at 344). Because a State has already undertaken its own cost-benefit analysis before approving an expenditure, it is "conjectural or hypothetical" for taxpayers to assert that such costs are an injury. *See Cuno*, 547 U.S. at 344 (quotation marks and citation omitted).

Just as a taxpayer may not assert that a challenged policy creates an injury because it requires a State to spend money, a State that has itself already conducted the applicable cost-benefit analysis may not either. In this case, the Texas legislature presumably acted rationally when it set the fee for driver's licenses at a level that required a subsidy; that is, it saw offsetting benefits (*e.g.*, safer roads, more drivers with automobile insurance, increased employment). Texas is not the only State to make

that cost-benefit calculation. Indeed, some States, including respondents Utah and Nevada, go further than Texas and offer driver's licenses to immigrants regardless of their immigration status. *See* Utah Code Ann. § 53-3-207; Nev. Rev. Stat. § 483.291(2)(b).[9] Presumably, those States too saw offsetting benefits from the costs of issuing additional licenses. Texas has offered no reason, let alone evidence, why the balance of costs and offsetting benefits will be any different for people newly eligible for licenses because of the Guidance than for all of the other deferred-action recipients whom Texas has long subsidized. *See* Intervenors' Br. 33. It has therefore failed to demonstrate a concrete injury.

If respondents were correct that increased state expenditures alone are an Article III injury, without regard to any of the other effects of the challenged action, then *Massachusetts v. EPA*, 549 U.S. 497 (2007), would have been an easy standing case. The Environmental Protection Agency's policy of not regulating greenhouse gas emissions from new motor vehicles almost certainly increased the costs of States like California that filled the gap with their

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[9] *See also* Nat'l Immigration Law Ctr., *State Laws Providing Access to Driver's Licenses or Cards, Regardless of Immigration Status* 2-3 (July 2015), https://www.nilc.org/wp-content/uploads/2015/11/drivers-license-access-table-2015-07-01.pdf (listing other States); Gregory A. Odegaard, *A Yes or No Answer: A Plea to End the Oversimplification of the Debate on Licensing Aliens*, 24 J.L. & Pol. 435, 445-50 (2008) (discussing some of the policy rationales).

own regulations. *See* Cal. Health & Safety Code § 43018.5(h) (California greenhouse-gas regulation may not be required if "the federal government adopts a standard regulating a greenhouse gas from new motor vehicles" of equal or better effectiveness); Ann E. Carlson, *Federalism, Preemption, & Greenhouse Gas Emissions*, 37 U.C. Davis L. Rev. 281, 282 (2003). California thus could have alleged a pocketbook injury related to federal policy just as Texas does here (and could have relied on its voluntary incorporation of federal law to satisfy the causation requirement).

Such incidental state expenditures, however, have never been considered a cognizable injury for standing purposes. The Fifth Circuit thought an incidental increase in state expenditures must be sufficient because otherwise courts would be required to engage in impermissible "costs and benefits" analysis. Pet. App. 23a. But that overlooks the critical fact that Texas itself has already conducted that analysis, and found that benefits offset costs. To nonetheless find an injury by looking at only one side of that ledger would be unwarranted. *See Winn*, 563 U.S. at 136-37.

The effects of recognizing a mere incidental increase to a State's budget as a cognizable injury would be far-reaching. Indeed, Texas asserts not only a burden on its budget from driver licensing, but also from its claim that it will increase spending on healthcare, education, and law enforcement as incidental consequences of the Guidance. Other States

will be able to assert the same burdens on their budgets as the result of virtually every federal policy. The result will be federal courts transformed into arenas for political battles between States and the federal government—and among the States themselves because in most such cases, as here, some States will conclude that the challenged federal policy is beneficial.

2. Importantly, Texas's alleged financial injury is wholly unlike the state injury the Court accepted as a basis for standing in *Massachusetts v. EPA*, the case on which the Fifth Circuit relied to justify giving respondents "special solicitude" to assert their claim, Pet. App. 12a-20a. Most fundamentally, no part of Massachusetts' injury was self-imposed; unlike respondents here, Massachusetts could not have avoided the harm it alleged by simply choosing not to extend a subsidy or incorporate federal law or practice.

Further, unlike in *Massachusetts*, the States here bring their claims under the generic cause of action in the APA, not under the kind of special judicial review provision the existence of which the Court in *Massachusetts* deemed "of critical importance to the standing inquiry." 549 U.S. at 516. The Immigration and Nationality Act (INA) provides no such special "procedural right" of judicial review to respondents. To the contrary, "the removal process is entrusted to the discretion of the Federal Government," not the States. *Arizona v. United States*, 132 S. Ct. 2492, 2506 (2012). The INA provides only narrowly circumscribed paths

to judicial review—all for *aliens*, not States or other third parties. *See* 8 U.S.C. § 1252.

Finally, Massachusetts' injury went directly to its sovereignty as a State—its "well-founded desire to preserve its sovereign territory" from encroachment by a rising sea, as well as its personal stake in preserving state-owned coastal lands. *Massachusetts*, 549 U.S. at 519, 522-23. That some respondents may choose to subsidize immigrant driver's licenses under a program their legislatures voluntarily implemented (or complain of other indirect and incidental effects of immigration) is not remotely comparable to Massachusetts' interest in the literal preservation of its sovereign territory.

### C. At The Least, Respondents Lack Standing To Challenge The Designation Of "Lawful Presence" Because They Have Not Alleged Any Injury Resulting From The Legal Effects Of That Designation

Respondents purport to challenge the Guidance's statement that aliens with deferred action status are "lawfully present" in the United States. Br. in Opp. 21-23. Apart from simply indicating that an alien will not be removed for so long as the federal government continues to forbear from such removal, *see* Pet. Br. 37, however, the designation of "lawful presence" has only a very limited effect under federal law with respect to the aliens in question here—namely, it makes them eligible to apply for Social Security retirement and disability benefits, Medicare benefits,

and benefits under railroad-worker programs. *See* Pet. Br. 8 (citing 8 U.S.C. § 1611(b)(2)-(4); 8 C.F.R. § 1.3(a)(4)(vi)).

Respondents have not even attempted to rely on deferred-action recipients' potential eligibility for such federal benefits as a basis for any injury they purport to have suffered. *See* Pet. App. 7a. Properly so. Federal administration of Social Security and like programs has nothing to do with state drivers' licensing or the other state expenditures respondents discuss. Respondents have thus not tried to show any injury based on aliens' potential benefits from such federal programs. Accordingly, even assuming *arguendo* that respondents have standing to challenge some other aspects of the Guidance, they plainly have no standing to challenge the designation of "lawful presence" and the potential ancillary extension of Social Security or other benefits to those with deferred action.

## II. RESPONDENTS LACK A CAUSE OF ACTION UNDER THE APA

Even if respondents had Article III standing, their challenge to the Guidance would fail because they lack an APA cause of action for two independent reasons. First, the choice to defer removal is "committed to agency discretion by law" and therefore immune from judicial review. 5 U.S.C. § 701(a)(2). Second, respondents cannot show that the injury they complain of—increased spending on driver's-license registrations—"falls within the 'zone of interests'

sought to be protected by" federal immigration laws. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990).

### A. The Guidance Is An Exercise Of Prosecutorial Discretion That Is Committed To Agency Discretion By Law And Therefore Unreviewable

1. The APA bars review of decisions that are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This prohibition has deep roots in our tradition of limited judicial review. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170-71 (1803) ("Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.").

Exercises of enforcement discretion are in the heartland of that prohibition on APA review. Indeed, the "Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). An agency's decision not to take enforcement action is therefore "presumed immune from judicial review under § 701(a)(2)." *Id.* at 832. To rebut that presumption of unreviewability, a party must show that Congress circumscribed agency discretion

by providing "meaningful standards for defining the limits of that discretion" such that a reviewing court has "'law to apply.'" *Id.* at 834-35; *see Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) ("Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes * * * .").

Sound reasons underlie the general non-reviewability of the Executive's enforcement discretion. Such decisions require an agency to perform "a complicated balancing of a number of factors which are peculiarly within its expertise"; to determine "whether it is likely to succeed in fulfilling its statutory mandate"; to evaluate whether undertaking specific action "best fits the agency's overall policies"; and to assess "whether the agency has enough resources" to undertake an action at all. *Lincoln*, 508 U.S. at 193 (quotation marks omitted; quoting *Heckler*, 470 U.S. at 831). Such quintessentially discretionary decisions are not amenable to judicial review.

That is particularly true here. The "complicated balancing" an agency must perform when making enforcement decisions is especially delicate for immigration: "Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws." *Arizona*, 132 S. Ct. at 2498. Undoubtedly for that reason, Congress has long conferred and protected executive discretion in immigration. As this Court explained with regard to the Illegal Immigration Reform and Immigrant Responsibility Act of

1996 (IIRIRA), Congress has passed numerous immigration-related statutes "aimed at protecting the Executive's discretion from the courts—indeed, that can fairly be said to be the theme" of IIRIRA. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999) ("*AADC*"). In *AADC* this Court interpreted 8 U.S.C. § 1252(g) to "give some measure of protection to 'no deferred action' decisions." *Id.* at 485. That is, even in cases where there is an agency enforcement action to remove—an action that would normally "provide[] a focus for judicial review," *Heckler*, 470 U.S. at 832—Congress limited judicial review of agency decisions not to grant deferred action.

2. Faced with this settled rule of nonreviewability, respondents appear to disclaim any challenge to the Secretary's decision not to remove the individuals covered by the Guidance. Br. in Opp. 20 (no challenge to Secretary's choice "deprioritizing removal for identified aliens"); *see* Pet. App. 44a ("Part of DAPA involves the Secretary's decision—at least temporarily—not to enforce the immigration laws as to a class of what he deems to be low-priority illegal aliens. But importantly, the states have not challenged the priority levels he has established, and neither the preliminary injunction nor compliance with the APA requires the Secretary to remove any alien or to alter his enforcement priorities." (footnote omitted)).

Respondents' decision to eschew an explicit challenge to the decision to defer removal was a wise

one. Deferred action involves non-binding and revocable decisions not to remove aliens for a limited time. *AADC*, 525 U.S. at 484-85. These decisions, like the unreviewable agency decision in *Heckler*, require the Department of Homeland Security to calculate how to allocate limited resources, further overall policy goals, and fulfill its statutory mandate. They also require discretionary consideration of "immediate human concerns," such as family relations and individual safety, as well as "international relations." *Arizona*, 132 S. Ct. at 2499. Because Congress gave no meaningful standards for limiting that discretion, there is no law to apply and the APA does not permit judicial review.

Instead of expressly challenging the Secretary's decision not to remove certain categories of aliens, respondents purport to challenge only his "affirmative acts of granting lawful presence and work-authorization eligibility." Br. in Opp. 21. But that linguistic characterization does not make the agency action that is the object of their challenge any more reviewable.

First, as noted above, the so-called "affirmative act of granting lawful presence" is not distinct from the decision to forebear removal. *See* Pet. Br. 38. And the only legal consequence of the designation of "lawful presence" is to make aliens eligible to apply for Social Security and other benefits—an ancillary effect respondents have no standing to challenge. *See supra* Section I.C.

Second, the principal consequence flowing from the government's decision to forbear removal about which respondents do complain—the eligibility to apply for work authorization—is not "conferred" by the Secretary's Guidance. That incidental consequence is instead established by other statutes and regulations that were on the books for decades before the Guidance issued. *E.g.*, 8 C.F.R. § 274a.12(c)(14) (deferred-action recipients may apply for work authorization); *see also* Pet. App. 110a-12a (King, J., dissenting) (discussing other examples). An alien's eligibility to apply for work authorization (which, if granted, will make it lawful for an employer to hire that alien, *see* 8 U.S.C. § 1324a(a)(1)(A), (h)(3)) can be triggered by any number of discretionary enforcement decisions by the Secretary that are themselves committed to the Secretary's discretion and therefore unreviewable, *see* Pet. Br. 40. Accordingly, if such eligibility provided a basis for judicial review under the APA, *Heckler* and 5 U.S.C. § 701(a)(2) would effectively become inapplicable in the immigration context.[10]

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[10] In their brief in opposition, respondents suggest that they are challenging the substantive correctness of the thirty-year-old work authorization regulation, at least as applied to classes of aliens specified by statute as eligible for work authorization. Br. in Opp. 34-35. The time for bringing such a challenge has long passed. Pet. Br. 54-55.

Respondents' attempt to characterize their challenge as one to incidental consequences, not enforcement discretion, is also incompatible with the INA's judicial review scheme. That statute prohibits an alien denied deferred action from seeking review of that decision. Pet. Br. 41; 8 U.S.C. § 1252(g). Surely, an alien denied deferred action could not file suit under the APA and successfully claim he was seeking review not of that adverse deferred action decision but instead of his resulting ineligibility for work authorization. If aliens—who have carefully circumscribed judicial review rights under the INA—could not bring an APA claim regarding incidental consequences, surely a non-alien—with no INA judicial review rights of any kind—may not do so. *Cf. Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 347-48 (1984) (presence of a "complex and delicate" statutory scheme for administrative and judicial review at the behest of only certain parties demonstrates congressional intent to "foreclose" APA suits by others).

3. Allowing review based on the label attached to a non-enforcement decision, or on incidental benefits or authorizations that can flow from it, would mark a dramatic departure from settled understandings of the limits of the APA cause of action. Many decisions not to enforce or prosecute can have collateral consequences. For example, a government contractor may be suspended from bidding for new government contracts if it is indicted for certain

offenses. 48 C.F.R. §§ 9.407-1(b)(1), -2(b).[11] If the Attorney General, in her discretion, decides to dismiss the indictment, then the disability is lifted. The collateral benefit of the exercise of prosecutorial discretion is the ability to bid for a government contract.

Under *Heckler*, the Attorney General's decision to drop the indictment would clearly be unreviewable. Yet, by pursuing respondents' theory of APA reviewability in this case, one of the company's competitors for a government contract could nonetheless use the APA to challenge the Attorney General's decision, contending that it was not actually challenging the non-prosecution but instead only the supposedly

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[11] Such provisions are commonplace. *See, e.g.*, 12 U.S.C. § 1818(g)(1) (party indicted for certain offenses is barred from affiliating with a federally insured depository institution, and may not control an insured institution's operations); 9 C.F.R. § 439.52 (indicted chemical laboratory's accreditation may be suspended); 13 C.F.R. § 108.1630(b)(2) (indicted broker may be suspended from dealing in debentures or trust certificates "while the charge is pending"); *id.* § 120.110(n) (business with associate under indictment ineligible for Small Business Administration business loan); *id.* § 120.660(b)(2) (indicted broker or dealer may be suspended from selling or dealing in regulated certificates); *id.* § 120.1711(b)(3) (similar for purchasing or dealing in pool loans, loan interests, or pool certificates); 19 C.F.R. § 118.21(a)(2) (operator of customs centralized examination station may be barred from operating facility while under indictment); 24 C.F.R. § 202.5(j)(2) (lenders ineligible to participate in federal housing programs while under indictment); *id.* § 214.103(c) (also barring an indicted party from acting as a Housing and Urban Development-approved counseling agency).

"affirmative act[ ]" (Br. in Opp. 21) of authorizing the contractor to bid on a new contract.

### B. Respondents Cannot Show An Injury Within The Zone Of Interests Congress Protected Under The INA

Respondents have no APA cause of action for the additional reason that their alleged injuries are not within the zone of interests protected under the INA. To bring an APA claim a plaintiff must establish that its alleged injury "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis" for its complaint. *Nat'l Wildlife Fed'n*, 497 U.S. at 883. "In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987).

Respondents' alleged injuries are too "marginally related" (*ibid.*) to any INA-protected interests to pass the test. Indeed, they are wholly unrelated. Respondents claim they will suffer increased costs of administering state programs, such as subsidized driver's licenses, for immigrants granted deferred action under the Secretary's Guidance. Yet nothing in the INA protects those interests: "[T]he central concern of the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens

lawfully in the country." *Sure-Tan*, 467 U.S. at 892 (quotation marks and citation omitted). Respondents acknowledge as much by pointing to Texas law, not the INA, when attempting to show that Texas "has a significant interest" in the challenged Guidance. Br. in Opp. 27 & n.14.

This Court's discussion of the zone-of-interests test in *Thompson v. North American Stainless, LP*, 562 U.S. 170 (2011), illuminates respondents' failure to satisfy it. In *Thompson*, the Court held that the zone-of-interests test (which it borrowed from APA law) should limit the class of plaintiffs who may bring claims under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. § 2000e *et seq.* 562 U.S. 177-78. The Court explained that application of this test was necessary to prevent "absurd consequences" that would follow from allowing anyone with Article III standing to sue. *Id.* at 176-77. For example, without the zone-of-interests test, "a shareholder would be able to sue a company for firing a valuable employee for racially discriminatory reasons, so long as he could show that the value of his stock decreased as a consequence." *Id.* at 177. If anything, respondents' claimed interests, such as holding down their spending on driver's licenses, are even further afield from the INA than were those of the hypothetical shareholder from Title VII. The APA therefore provides them no cause of action.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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